

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7316

Investigation into regulation of Voice over)
Internet Protocol ("VoIP") services)

Order entered: 2/11/2010

ORDER DENYING MOTION FOR LIMITED INTERVENTION

In this Order, I dispose of two motions filed by Stowe VOIP, LLC ("Stowe VOIP"). The first motion seeks leave for limited permissive intervention. The second motion seeks to stay this proceeding until such time as the Federal Communications Commission ("FCC") rules on a question of federal law that Stowe VOIP believes may prove to be controlling with respect to the legal and regulatory policy questions under consideration in this docket. I deny the motion for limited intervention. Consequently, I decline to consider Stowe VOIP's motion to stay this proceeding because Stowe VOIP lacks legal standing to file such a motion in this docket.

On March 27, 2008, Stowe VOIP filed a request to intervene in this proceeding.

On April 9, 2008, Stowe VOIP was granted leave to intervene on a permissive basis in this case pursuant to Board Rule 2.209(B).¹

On June 4, 2008, Stowe VOIP filed a request to change its status in this docket to that of an interested person.² Stowe VOIP's request was unopposed.

On November 18, 2008, Stowe VOIP was given leave to withdraw as an intervenor and to be treated instead as an interested person in this proceeding.³

1. Docket 7316, *Order Re: Interventions* dated 9/4/09.

2. Letter from Robert J. Rohr to Susan M. Hudson, Clerk of the Board, dated June 4, 2008.

3. Tr. 11/18/09 at 6.

On January 4, 2010, Stowe VOIP filed a motion to stay this docket, as well as comments on the Proposal for Decision ("PFD") that was circulated to the parties on December 8, 2009.⁴

On January 5, 2010, the Clerk of the Board advised Stowe VOIP by telephone that it did not have the requisite party-standing to make these filings.

On January 6, 2010, Stowe VOIP filed a motion seeking intervenor status in this docket "for the limited purpose of pursuing its Motion to Stay dated January 4, 2010."⁵

On January 8, 2010, the Vermont Department of Public Service (the "Department") and Central Vermont Public Service Corporation ("CVPS") filed responses opposing the Intervention Motion and the Motion to Stay. CVPS and the Department contend that the Intervention Motion is untimely, and the Motion to Stay lacks merit because it does not raise any issues that had not already been raised, considered and rejected in the PFD.⁶ On January 11, 2010, the Independents filed a letter concurring with these arguments.⁷

On January 15, 2010, Stowe VOIP filed a sur-reply to the DPS Response and the CVPS Response.⁸

Stowe VOIP's Motion to Intervene

In proceedings before the Vermont Public Service Board ("Board"), permissive intervention motions are governed by Board Rule 2.209(B), which provides:

4. *Comments on Proposal for Decision and Motion to Stay* dated January 4, 2010, (hereinafter "Motion to Stay").

5. *Motion for Limited Permissive Intervention* dated January 6, 2010, at 1 (hereinafter "Intervention Motion").

6. *DPS Opposition to Stowe Comments and Motion to Stay* dated January 8, 2010, at 2 (the "DPS Response"); *Central Vermont Public Service Corporation Comments on Proposal for Decision* dated January 8, 2010, at 3-4 (the "CVPS Response").

7. Letter from Cassandra Larae-Perez, Esq., to Susan Hudson, Clerk of the Board, dated January 11, 2010. The Independents are a group comprised of the following members: Franklin Telephone Company; Ludlow Telephone Company; Northfield Telephone Company; Perkinsville Telephone Company; Shoreham Telephone Company; Topsham Telephone Company, Inc.; Vermont Telephone Company, Inc.; and Waitsfield-Fayston Telephone Company, Inc., d/b/a Waitsfield Telecom, d/b/a Champlain Valley Telecom.

8. *Stowe VOIP, LLC's, Reply Memorandum in Support of its Motion for Limited Permissive Intervention and to Stay* dated January 15, 2010 ("Stowe Sur-reply").

Upon timely application, a person may, in the discretion of the Board, be permitted to intervene in any proceeding when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding. In exercising its discretion in this paragraph, the Board shall consider (1) whether the applicant's interest will be adequately protected by other parties; (2) whether alternative means exist by which the applicant's interest can be protected; and (3) whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or of the public.

Stowe VOIP maintains that its motion satisfies all of the elements of the Board's rule for granting permissive intervention. Specifically, Stowe VOIP contends that it is a provisioner of "fixed" voice-over-internet-protocol ("VoIP") service in Vermont, and that as such, it has a substantial interest in ensuring that its fixed VoIP service does not become subject to Vermont state regulation as a "telecommunications service" pursuant to Vermont law.⁹ Stowe VOIP argues that its fixed VoIP service is exempt from state law regulation because it qualifies as an "information service" as that term is defined by federal law.¹⁰ Stowe VOIP further contends that no alternative means exist for representing its interest and that its interest will not be adequately represented by any other party, citing as proof the fact that no other party has moved to stay this proceeding.¹¹ Finally, Stowe VOIP maintains that granting its motion will not result in undue delay in this proceeding.¹²

Both the Department and CVPS maintain that Stowe VOIP's intervention request is untimely, and that granting it would be prejudicial to the parties of record in this case, as well as to consumers of VoIP services in Vermont.¹³ Furthermore, according to the Department and CVPS, Stowe VOIP has failed to cite a substantial interest that has not been adequately represented by other VoIP providers who have participated in the proceedings to date.¹⁴ Finally,

9. Intervention Motion at 2.

10. *Id.*

11. *Id.*

12. *Id.*

13. DPS Response at 1; CVPS Response at 4.

14. DPS Response at 2; CVPS Response at 4.

the Department argues that granting Stowe VOIP's intervention motion would set the undesirable precedent of allowing a litigant to participate asymmetrically in Board proceedings by exercising the procedural rights of advocating for a legal conclusion and moving for a stay without assuming the concomitant procedural responsibility of allowing its legal position to be tested by party-opponents through the adversarial process.¹⁵

Turning first to the question of whether Stowe VOIP has demonstrated a substantial interest in this proceeding, I find that this element has been met. Stowe VOIP's substantial interest is to ensure that its VoIP service offering remains unregulated at the state level.¹⁶ To serve this interest, Stowe VOIP has intervened to pursue a very limited procedural objective, namely, to obtain a stay of this docket pending the FCC's determination as to whether fixed VOIP constitutes an "information" service or a "telecommunications service" as defined by federal law.¹⁷ Significantly, Stowe VOIP is not offering to supplement the factual record of this investigation as to the present state of VoIP offerings in Vermont; nor is Stowe VOIP seeking an opportunity to shape state regulatory policy as this docket moves forward to determine how the Board should exercise its jurisdiction, if at all, to regulate intrastate, fixed VoIP service as a "telecommunications service" under Vermont law.

Turning next to the timeliness of the Intervention Motion, I note that Stowe VOIP has offered no explanation for why it allowed seventeen months to pass before moving to restore its party standing in this docket. During that time, several rounds of discovery, technical hearings and two rounds of briefing were completed, all without benefit of Stowe VOIP's participation in this case. I agree with the Department that it was incumbent upon Stowe VOIP to seek a stay "at a time prior to the parties and the Board expending significant time and resources moving forward with the Docket."¹⁸ Furthermore, as CVPS points out, the FCC proceeding to which Stowe VOIP now points as grounds for staying this state-law investigation was pending when

15. DPS Response at 5.

16. Stowe Sur-reply at 3 ("what Stowe is saying is that VoIP services are 'information services' under federal law and that they are therefore immune from state regulation as a 'telecommunications service.'")

17. *Id.*

18. DPS Response at 6.

Stowe VOIP first intervened in this docket in March of 2008.¹⁹ This FCC proceeding was also pending when Stowe VOIP withdrew from active participation as an intervenor in June of 2008, and in fact remains pending to this date. Therefore, under these circumstances, I conclude that the Intervention Motion was not timely filed.²⁰ Stowe VOIP's conduct leads me to conclude that Stowe VOIP wishes only to selectively participate in this case, depending on whether the factual and legal conclusions evolve to its liking. I cannot condone such a tactical approach to participation, because "a party must assume all obligations of a party and cannot selectively choose the times when it will and will not participate in a proceeding."²¹

Stowe VOIP asserts that no party will adequately protect its interest and that no other means exist for protecting that interest beyond allowing Stowe VOIP to permissively intervene. As the Department and CVPS have correctly pointed out, other parties in this docket who are VoIP service providers have "vigorously litigated the position that VoIP services are information services under federal law, and that states are therefore preempted from regulating all VoIP services"²² This position is identical to Stowe VOIP's own stated interest and the argument

19. CVPS Response at 4.

20. Stowe VOIP has also argued that the Intervention Motion was timely because it concerns the Board's subject-matter jurisdiction, which may be challenged at any time in a proceeding. Stowe Sur-reply at 2. Stowe VOIP cites no authority for this argument. The familiar proposition that questions of subject-matter jurisdiction may be raised at any time in a litigation commonly comes up in the context of applying V.R.C.P. 12(h)(3), which requires that a court dismiss an action whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter. Neither the Intervention Motion nor the Motion to Stay suggest that Stowe VOIP meant for either filing to be interpreted as a Rule 12(h)(3) motion seeking dismissal of this investigation for lack of subject-matter jurisdiction. Accordingly, the "whenever" standard of Rule 12(h)(3) does not absolve Stowe VOIP from the timeliness requirement for seeking leave to intervene.

21. Docket 7373, *Joint Petition of Vermont Electric Power Company, Inc., et al., for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing the construction of the Southern Loop Transmission Upgrade Project*, Order of 8/27/08 at 3 (rejecting municipality's attempt to suspend participation, and observing that "a party can't decline to respond to discovery requests or motions directed at it on the basis it has suspended its participation.")

22. DPS Response at 2; *see also* CVPS Response at 4. The VoIP service providers who have actively participated in this docket are Comcast Phone of Vermont, LLC ("Comcast Phone") and AT&T Corp., neither of whom has commented upon Stowe VOIP's Intervention Motion.

it has advanced in support of that interest.²³ Because Stowe VOIP has offered no other reason for seeking to intervene beyond moving for a stay, I find it appropriate to give heightened consideration to the fact that other parties of record who are VoIP service providers have made arguments in this proceeding that are expressly designed to advance the interest shared by Stowe VOIP in immunizing VoIP services from state-level regulation.²⁴

Stowe VOIP counters that the representation of its interest to date has been and will remain inadequate, as evidenced by the failure of any of the parties of record to move in their own right for the stay Stowe VOIP wishes to pursue by intervening on a limited, permissive basis.²⁵ A review of the comments received concerning the PFD shows that Comcast Phone continues to maintain that its fixed VoIP service offering is an information service that is exempt from regulation as a "telecommunications service" pursuant to Vermont state law.²⁶ I therefore find Stowe VOIP's "inadequate representation" argument unpersuasive, as it reflects a failure to distinguish between the adequacy of representing a legal interest and the adequacy of the litigation tactics chosen in the course of representing that interest. It is well-settled that a difference of opinion concerning litigation tactics does not constitute "inadequate representation" for purposes of deciding an intervention motion.²⁷

On balance, I conclude that while Stowe VOIP has a substantial interest that is likely to be affected by the outcome of this proceeding, that interest has and will be adequately protected by other VoIP service providers who are actively participating as parties of record in this docket.

23. Intervention Motion at 2; Stowe Sur-reply at 2-3.

24. *Helgeland v. Wisconsin Municipalities, et al.*, 307 Wis.2d 1, 44-45; 745 N.W.2d 1, 22 (2008) ("If a movant's interest is identical to that of one of the parties, . . . a compelling showing should be required to demonstrate that the representation is not adequate. When the potential intervenor's interests are substantially similar to interests already represented by an existing party, such similarity will weigh against the potential intervenor.")

25. Stowe Sur-reply at 1.

26. *Comcast Phone of Vermont, LLC's Comments of the Proposal for Decision* dated January 11, 2010, at 10-13.

27. 7C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1909, at 431-33 (2007)(collecting cases). See also *Cascade Natural Gas Corp. v. El Paso Natural Gas Co. et al.*, 386 U.S. 129, 155-56(1967) ("Mere tactical disagreement over how litigation should be conducted is obviously insufficient to support intervention of right.")

For this reason, and also in light of the untimeliness of the motion, I deny Stowe VOIP's motion to intervene on a permissive basis for the limited purpose of moving to stay this proceeding.

Finally, it bears noting that the conclusion I reached above about the untimeliness of the Intervention Motion is largely due to the very limited purpose for which Stowe VOIP has sought to permissively intervene. Should the Board accept my recommendation²⁸ to initiate a second phase of inquiry for this proceeding, then I would encourage Stowe VOIP to seek leave to permissively intervene at that time for the broader purpose of informing the factual record about the nature of the services it provides, as well as to aid the Board in understanding the implications of any exercise of its state regulatory jurisdiction over "telecommunications services" as that term is defined in 30 V.S.A. § 203(5).

Stowe VOIP's Motion to Stay

In light of my decision to deny Stowe VOIP's request to permissively intervene in this docket for the limited purpose of seeking a stay, I do not decide the Motion for Stay, as Stowe VOIP lacks legal standing to bring this motion in this proceeding.

So ORDERED.

Dated at Montpelier, Vermont, this 11th day of February, 2010.

s/June E. Tierney
June E. Tierney, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: February 11, 2010

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

28. Docket 7316, Proposal For Decision dated December 8, 2009, at 34.